FILED
FEB 20 1975

No. 74-939

In the Supreme Court
of the United States

OCTOBER TERM, 1974

MAX A. QUICK,

Petitioner,

v.

WAYNE HANSEN,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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OPINIONS BELOW

The opinions below are adequately set forth in the petition.

JURISDICTION

The jurisdictional elements are adequately set forth in the petition.

QUESTION PRESENTED

Respondent is satisfied with the question as presented in the petition.

STATUTORY PROVISIONS INVOLVED

The statutory provisions are adequately set forth in the petition.

STATEMENT

Respondent is satisfied with the statement insofar as it relates to the facts relevant to the question presented. The facts as they concern the question of whether or not the Lewis River is in fact navigable are incomplete, but will not be supplemented here because that question is not being presented to the Court.

ARGUMENT

Contrary to Petitioner's statement, the sole question presented here has been decided. The United States Court of Appeals for the Fourth Circuit has stated that a district judge is required to determine the question of navigability *de novo* on the record made at trial even though the Federal Power Commission may have made a finding on that question. *United States* v. *Appalachian Electric Power Co.*, 107 F.2d 769, 791 (4th Cir. 1939). The case was appealed to the Supreme Court where it was decided on other grounds. *United States* v. *Appalachian Electric Power Co.*, 311 U.S. 377 (1940).

The Court of Appeals pointed out that the Federal Power Act, 16 U.S.C.A., § 791, et seq., does not provide for a "hearing" but only for an "investigation" by the Commission, nor does it provide for any judi-

cial review of the findings made. At page 791 the Court stated:

> "Assuming that the finding of the Commission is a relevant fact for the consideration of the court, and that it is entitled to careful and respectful consideration of a body informed by experience, nevertheless it cannot properly be regarded as controlling judicial determination on the record in the case."

It is clear that there was no adjudication on the question of the navigability of the Lewis River in the area where the accident occurred until the Federal District Judge, affirmed by the United States Court of Appeals for the Ninth Circuit, decided that question against Petitioner.

There is no conflict in the decisions and there is no important question of federal law which has not already been decided.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for writ of certiorari should be denied.

Respectfully submitted,

MORRISON, DUNN, COHEN,
MILLER & CARNEY

By .....
THOMAS H. TONGUE
Of Attorneys for Respondent

I hereby certify that I served the foregoing Respondent's Brief on Raymond J. Conboy, one of attorneys for Petitioner, on the day of February, 1975, by mailing to said attorney three correct copies thereof, certified by me as such, contained in a sealed envelope, with postage paid, addressed to said attorney for Petitioner at his address, to wit: 808 Standard Plaza, Portland, Oregon 97204, and deposited in the post office at Portland, Oregon, on said day. Between the said post office and the address to which said copy was mailed, there is a regular communication by U. S. Mail.

DATED this day of February, 1975.

MORRISON, DUNN, COHEN,
MILLER & CARNEY

By
THOMAS H. TONGUE
Of Attorneys for Respondent